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CHARLES ELMORE CRADLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1941

EXHIBIT SUPPLY COMPANY,
Petitioner,

vs.

ACE PATENTS CORPORATION,
Respondent.

No. 154

GENCO, INC.,
Petitioner,

vs.

ACE PATENTS CORPORATION,
Respondent

No. 155

CHICAGO COIN MACHINE COMPANY,
Petitioner,

vs.

ACE PATENTS CORPORATION,
Respondent.

No. 156

**BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO
DISMISS WRITS OF CERTIORARI.**

✓ CLARENCE E. THREEEDY,

✓ JOHN H. SUTHERLAND,

Counsel for Petitioners.

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No. 156

**BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO
DISMISS WRITS OF CERTIORARI.**

*To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Contrary to the unfounded inference in the second sentence of the motion, respondent had ample time to reply to the Petition for Rehearing herein. The Petition

for Rehearing was received by counsel for respondent on October 29, 1941. The Court did not act upon it until November 10, 1941. That is more time than the Rules of this Court provide for reply briefs on the merits (Rule 27-4).

There is nothing unusual about a verified showing re concentration of industry in a petition for rehearing. Such was done in *Schriber-Schroth v. Cleveland Trust Co. et al.*, 305 U. S. 47. The annexed affidavit of John H. Sutherland demonstrates that such a showing was in good faith omitted from the original Petition here.

Without burdening the Court with an extended answer to respondent's premature argument of the case, we make the following succinct observations anent the numbered paragraphs of the motion:

I.

We pointed out in our Reply Brief (p. 2) that this case presented no issue of fact. Respondent cites nothing which would require that this Court "become a trier of disputed facts" in this case.

II.

Concurring decisions of the lower courts do not mitigate the importance or the unsettled character of the questions of law presented by the Petition.

III.

That the root of the pin table business is in the Seventh Circuit seems conceded. That there may be users, repairmen, jobbers or distributors in every state is no more true here than was the case with pistons (*Schriber-*

Schroth v. Cleveland Trust Co. et al., 305 U. S. 47); motion picture projectors (*Altoona Publix Theatres v. American Tri-Ergon Corp.*, 294 U. S. 477); or outboard motors (*Muncie Gear Works, Inc., et al. v. Outboard, Marine & Mfg. Co.*, No. 323).

IV.

In our Petition for Rehearing (p. 5) we advised the Court of pertinent factual differences between the intervening rights situation presented here and in the Muncie case. Respondent's motion ~~adds nothing~~ save the erroneous statement that the record contains no evidence of intervening rights. On the contrary, see Exhibit 23 (Rec. 357); Exhibit 24 (Rec. 361); Exhibit 25 (Rec. 363). See also Rec. 91.

Petitioners are under a (superseded) injunction. That petitioners may not presently be manufacturing the found-infringing structures does not render the case moot. The same situation existed in *Schriber-Schroth v. Cleveland Trust Co. et al.*, 305 U. S. 47 and 311 U. S. 211.

In view of the foregoing, it is respectfully submitted that the respondent's motion should be overruled.

Respectfully submitted,

EXHIBIT SUPPLY COMPANY,
GENCO, INC.,
CHICAGO COIN MACHINE COMPANY,

.....
By CLARENCE E. THREEDY,

.....
JOHN H. SUTHERLAND,
Counsel for Petitioners.

November 17, 1941.

AFFIDAVIT OF JOHN H. SUTHERLAND.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

JOHN H. SUTHERLAND, being duly sworn, deposes and says that he is counsel for petitioner in the above-entitled cases and was counsel for petitioner in *Schriber-Schroth v. Cleveland Trust Co. et al.*, 305 U. S. 47, and 311 U. S. 211;

Affiant states that when the petition for writ of certiorari in these cases was originally prepared he was under the mistaken impression that the industry in question here was not concentrated in the Seventh Circuit; that this mistaken impression arose from the fact that an advertisement of the Pacent Novelty Mfg. Company of Utica, New York, appeared in the record at page 397;

That he was not advised that said Pacent Novelty Mfg. Co. had gone out of business so that the industry became concentrated in the Seventh Circuit until on or about October 24, 1941.

.....
JOHN H. SUTHERLAND,

SUBSCRIBED and sworn to before me this 17th day of November, 1941.

LESLIE M. HANSEN,
Notary Public.

